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(2)

No. 09-341

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

ANTHONY D'ARIA,

Petitioner,

v.

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-and-

UBS FINANCIAL SERVICES, INC., a corporation, UBS PAINE WEBBER, a corporation, PAINE WEBBER GROUP, INC., a corporation,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UBS FINANCIAL SERVICES, INC.

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STATEMENT PURSUANT TO RULE 29.6

UBS Financial Services, Inc. ("UBS") is a wholly-owned subsidiary of UBS Americas Inc. Shares of UBS are not publicly traded.

UBS Americas Inc. is a wholly owned subsidiary of UBS AG. UBS AG is publicly traded on the New York Stock Exchange, the Swiss Stock Exchange, and the Tokyo Stock Exchange.

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SUMMARY OF REASONS FOR DENYING THE PETITION

The Court should deny review of the unpublished memorandum disposition. The case is not properly justiciable under Article III. First, petitioner Anthony D'Aria seeks an advisory opinion on the question presented. The ruling he seeks, on the attorney's fee-reversion provision at issue, would have no consequences in his case because the Ninth Circuit found that no amount of the attorney's fee at issue would revert, to the settling defendant or anyone else. Second, D'Aria lacks standing even to make the argument because he was denied leave to intervene in the case. He is not a proper party.

In any event, D'Aria identifies no conflict in the court of appeals cases that warrants this Court's review even assuming *arguendo* that the Article III defects in the petition could be overlooked or resolved.

STATEMENT OF THE CASE

On June 30, 2006, plaintiffs filed this consolidated class and collective action ("*Glass*") in the United States District Court for the Northern District of California. They alleged that: (1) UBS misclassified an alleged class of non-California Financial Advisors as exempt from overtime laws; and (2) UBS violated state laws by not reimbursing the class for certain business-related expenses.

UBS previously had mediated and agreed to settle *Bowman v. UBS Financial Services, Inc.*, in which a

purported class of California Financial Advisors made similar allegations. The district court in the Northern District of California (Chesney, J.) preliminarily approved the *Bowman* settlement on July 6, 2006, and granted final approval on November 22, 2006.

Meanwhile, the *Glass* parties also mediated and agreed to a settlement. On July 7, 2006, Judge Chesney granted the *Glass* parties' joint motion to relate this case to *Bowman*. On August 25, 2006, Judge Chesney provisionally certified the class and granted preliminary approval of the *Glass* settlement.

The settlement resolved the named plaintiffs' and class members' federal and state-law claims for a maximum amount of $45,000,000. *See* Pet. App. 13a. The maximum payout included up to $11,250,000 in attorney's fees and litigation costs to class counsel, subject to court approval; a pool of up to $100,000 in enhancements to be divided among the named class representatives, subject to court approval; and a reasonable amount to the claims administrator to administer the settlement ($182,847.90). *See* Pet. App. 14a. If the court awarded less than the requested attorney's fees or class representative enhancements, the residual would revert to UBS. The remainder of the maximum payout (approximately $33,467,152) was available for distribution to class members. *See id.*

Following preliminary approval, the settlement administrator sent notice packets to 13,176 class members by first-class mail. The class members had until November 14, 2006 to object. *See* Pet. App. 15a. Eight class members timely objected to the settlement.

Id. (In addition, the New York State Attorney General filed an *amicus curiae* brief, which the district court treated as an objection. *Id.*) Four of the objectors thought the *Glass* action never should have been filed at all; they objected to the settlement to register their "offense" and "disgust" at what they saw as a "pure opportunistic case" that improperly sought to turn Financial Advisors into "time-card punching employee[s] focused on overtime pay." The remaining objectors contended that the settlement was too lean, for various reasons.

Petitioner D'Aria was not one of the objectors. To the contrary, on September 22, 2006, he filed a "consent[] to be a party plaintiff . . . and authorize[d] Class Counsel to act on [his] behalf in all matters relating to this action, including the settlement of [his] claims." Resp. App. 22a.

Meanwhile, in an unrelated matter, UBS had been preparing to sue Lawrence Kaufmann, a former UBS employee, for not repaying an employee loan. Kaufmann, in turn, was preparing a cross-complaint alleging (among other things) wrongful discharge. Kaufmann was a member of the *Bowman* class, and on September 21, 2006 he objected to the *Bowman* settlement. A few weeks later, on October 13, 2006, Kaufmann moved to intervene in both *Bowman* and *Glass*. Kaufmann's counsel, George Mahr III, then approached UBS and proposed that Kaufmann would abandon his wrongful termination allegations and withdraw with prejudice his objections and motion to intervene in *Glass*, if UBS dropped its threatened lawsuit and forgave Kaufmann's obligation to repay the loan. UBS executed a settlement

with Kaufmann on the terms that Kaufmann's counsel proposed. On November 15, 2006, Kaufmann filed notice of the settlement in the district court and asked the court to withdraw his objection (in *Bowman*) and motions to intervene (in both *Bowman* and *Glass*).

The following day, D'Aria moved to join or be substituted for Kaufmann as (1) an objector to a proposed settlement in *Bowman*, and (2) a movant and intervenor-plaintiff in a motion to intervene, for consolidation, and for other relief in *Bowman* and *Glass*. Resp. App. 12a-21a. The court denied his motion because D'Aria "cite[d] no authority permitting him to join or substitute himself as the movant for purposes of asserting another person's motion to intervene." Pet. App. 76a. Moreover, because D'Aria filed his motion *after* Kaufmann withdrew his motions to intervene, there were no "motions pending in which D'Aria [could] 'join' or 'substitute.'" Pet App. 77a.

That same day, the court ordered the parties to file memoranda "addressing whether [the district court] should approve Kaufmann's motion to withdraw his objections to the proposed settlement." Resp. App. 11a. The parties did so, as did D'Aria. D'Aria subsequently moved to intervene in *Glass* on December 15, 2006. *See* Pet. App. 54a.

On January 17, 2007, the district court issued orders addressing Kaufmann's motion to withdraw and D'Aria's various motions. First, the court struck D'Aria's memorandum regarding Kaufmann's motion to withdraw because (1) "D'Aria, as a member of the class, is represented by plaintiffs' [class] counsel; when the

Court sought the parties' comments on the propriety of permitting Kaufmann to withdraw his objections, the Court did not invite the filing of individual briefs by members of the class," Resp. App. 3a; and (2) D'Aria did not timely object to the proposed settlement, and the court previously had denied D'Aria's untimely request to adopt Kaufmann's objections as his own, *id.* Second, the court approved Kaufmann's withdrawal of objections to the settlement because they largely were redundant of the comments of the New York Attorney General. Resp. App. 5a-6a. Finally, the court denied D'Aria's motion to intervene, because it was untimely and D'Aria was adequately represented. Pet. App. 60a-67a.

On January 26, 2007, the district court granted final approval of the settlement. The district court reviewed *de novo* the issues covered in a Special Master's report, carefully considered the objections raised, and found that none of the objections warranted rejection of the settlement because the settlement was fair, reasonable, and adequate. Pet. App. 44a. The district court also awarded the entire amount of the agreed-upon fees to class counsel. Pet. App. 51a, 53a. Thus, the reversionary provision D'Aria now disputes never was triggered.

The Ninth Circuit affirmed the district court's order on May 14, 2009, in an unpublished memorandum disposition. It held that D'Aria lacked standing to challenge the fairness of the settlement agreement or the reasonableness of class counsel's fees because he had failed to file a timely objection or motion to intervene. Pet. App. 10a.

REASONS FOR DENYING THE PETITION

D'Aria has failed to present a question that even is justiciable under Article III, let alone one appropriate for this Court's review. First, he seeks an advisory opinion regarding the validity of reversionary provisions in class action settlement agreements. Resolution of that question will not affect the result in this case because the reversionary clause never was triggered; the district court and court of appeals affirmed the attorney's fee in full. Second, D'Aria lacks standing to appeal because, as the Ninth Circuit held, he did not timely object to, or intervene in, the proceedings below. D'Aria consented to the settlement and then waited until one month after the deadline to object had passed before he moved to intervene. The district court properly exercised its discretion in finding inadequate justification for his delay.

I. D'ARIA SEEKS AN ADVISORY OPINION REGARDING A PROVISION OF THE SETTLEMENT AGREEMENT THAT NEVER WAS TRIGGERED

D'Aria seeks review of an issue that is not presented. He contests a provision of the settlement agreement which stated that any portion of the agreed-upon attorney's fee not awarded to class counsel would revert to UBS. That provision is not at issue here because there never was any reversion; the district court awarded the entire agreed-upon fee to class counsel, and the Ninth Circuit affirmed.

In essence, therefore, D'Aria seeks an advisory opinion on reversionary clauses, in violation of the Article III case-or-controversy requirement. "A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . It must be a real and substantial controversy . . . , as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (citations omitted); *accord Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (per curiam) ("We do not sit to decide hypothetical questions or give advisory opinions about issues as to which there are not adverse parties before us."). Because D'Aria presents only a hypothetical question about the validity of reversionary clauses in class action settlement agreements — the resolution of which will not affect the rights of the litigants in *this* case — he cannot satisfy Article III's case-or-controversy requirement.

D'Aria contends, however, that the reversionary clause chills judicial review of fee awards by diminishing the incentive of potential objectors to question them. But "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'" *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (citation omitted). Here, D'Aria cannot demonstrate even a chill, let alone any actual harm, because the objectors in this case *did* (unsuccessfully) challenge the fee award. In the absence of actual evidence, therefore, D'Aria is left with unsubstantiated generalizations to support his claim.

In sum, this Court should deny review because D'Aria's petition fails to raise an Article III case or controversy. There is little reason to consider the validity of reversionary provisions in any event; even D'Aria concedes the absence of any conflict in the court of appeals decisions on this issue. Pet. at 18. But even if the Court were to find the issue of reversionary clauses worthy of review, this case is not the appropriate vehicle to do it, for the simple reason that the reversionary provision here never was triggered.

II. D'ARIA LACKS STANDING TO APPEAL THE SETTLEMENT AGREEMENT BECAUSE HE FAILED TO FILE A TIMELY OBJECTION OR MOTION TO INTERVENE IN THE DISTRICT COURT

Even if the issues D'Aria raises were justiciable, he is not a proper party to assert them.

It is fundamental that a class member who would appeal a class settlement must object in the district court. *E.g.*, *Devlin v. Scardelletti*, 536 U.S. 1, 11 (2002); *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 354 F.3d 1246, 1256-58 (10th Cir. 2004). D'Aria did not object to the settlement agreement in this case. Instead, he consented to be a party plaintiff and authorized class counsel to settle his claims. D'Aria therefore lacks standing to challenge the settlement agreement.

Three months after consenting to join the settlement, D'Aria sought to intervene in *Glass*. D'Aria's motion to intervene came too late in the proceedings. He moved one month after the November 14, 2006

deadline to object and two months after consulting with his counsel regarding the "issues involved in the actions and their proposed settlements" (in early to mid-September). Resp. App. 8a.

The settlement did not change after he joined. Nor had the litigation entered a new stage of the proceedings. The only thing that had changed was Kaufmann's withdrawal of his own intervention request, which by definition did not involve D'Aria. If D'Aria felt his interests would no longer be adequately protected by the parties, he would have learned this earlier, when he received notice of the settlement, *see San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1101 (9th Cir. 1999).

D'Aria thus has no justification for his delay. A party must intervene when he "knows or has reason to know that his interests might be adversely affected by the outcome of litigation." *United States v. Alisal Water*, 370 F.3d 915, 923 (9th Cir. 2004) (quoting *United States v. Oregon*, 913 F.2d 576, 589 (9th Cir. 1990)). D'Aria consented to join the settlement almost three months before moving to intervene. In consenting to join, he authorized *Glass* class counsel to act on his behalf and sought his share of the settlement.

The Kaufmann objections, withdrawal, and settlement have nothing to do with D'Aria. He was free to object or intervene at any time after he received notice of the settlement, including at a time when Kaufmann's motion was pending. Indeed, as the district court noted, the class notice "expressly provided that any class member who failed to object in the manner

set forth in the Class Notice would be 'deemed to have waived any objections and [would] be foreclosed from making any objection.'" Pet. App. 66a. D'Aria now contends that he detrimentally relied on Kaufmann's involvement, but the class notice he received specifically warned him of his obligation to file his own objections. *See id.*

D'Aria thus failed to file a timely objection or motion to intervene in the proceedings below, and now lacks standing to challenge approval of the settlement agreement on appeal. D'Aria's petition is dismissive on the significance his lack of standing. Pet. at 8 ("Procedural obstacles thwarted D'Aria . . . . , [but] [t]he procedural merits of D'Aria's efforts to be heard . . . are immaterial here. . . ."). Article III's requirements, however, cannot be cast aside so casually. D'Aria asserts no justiciable controversy.

CONCLUSION

This Court should deny review. D'Aria seeks an advisory opinion on the validity of fee-reversion provisions. Moreover, D'Aria lacks standing to challenge the settlement on appeal given his failure to do so in the district court. These Article III defects are dispositive.

Respectfully submitted,

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* *Counsel of Record*

APPENDIX

APPENDIX A — ORDER (1) GRANTING MOTIONS TO STRIKE D'ARIA MEMORANDUM FILED IN RESPONSE TO COURT'S ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO PROPOSED SETTLEMENT; (2) GRANTING APPROVAL OF LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO SETTLEMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 17, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER (1) GRANTING MOTIONS TO STRIKE D'ARIA MEMORANDUM FILED IN RESPONSE TO COURT'S ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO PROPOSED SETTLEMENT; (2) GRANTING APPROVAL OF LAWRENCE R. KAUFMANN'S WITHDRAWAL OF OBJECTIONS TO SETTLEMENT

(Docket Nos. 106, 121)

Appendix A

On November 15, 2006, the Court received, from an attorney representing proposed intervenor Lawrence R. Kaufmann ("Kaufmann"), a letter dated November 13, 2006, along with Kaufmann's declaration, by which documents Kaufmann sought to withdraw his motion to intervene in the instant action. By order issued November 16, 2006, the Court deemed the motion to intervene withdrawn, but noted that the motion also contained objections to the proposed class action settlement and that such objections "may be withdrawn only with the court's approval." *See* Fed. R. Civ. P. 23(e)(4)(B). In its November 16, 2006 order, the Court afforded "the parties" the opportunity to brief the issue of whether the Court should approve Kaufmann's withdrawal of his objections to the proposed settlement. (*See* Order re: Lawrence R. Kaufmann's Withdrawal of Motion to Intervene and Objection to Settlement, filed Nov. 16, 2006, at 1.)

On December 1, 2006, plaintiffs and defendants, respectively, filed separate responses to the Court's November 16, 2006 order, arguing, in each instance, that the Court should permit Kaufmann to withdraw his objections. Also on that date, Kaufmann's former counsel of record filed a memorandum on behalf of class member Anthony D'Aria ("D'Aria") along with an accompanying declaration from counsel (collectively, "D'Aria memorandum"), arguing that the Court should not permit Kaufmann to withdraw his objections.

On December 1, 2006, plaintiffs filed a motion to strike the D'Aria memorandum. On December 11, 2006,

defendants filed a separate motion to strike the D'Aria memorandum. On December 29, 2006, D'Aria filed a consolidated opposition to the motions to strike, and, on January 5, 2007, UBS filed a reply.[1]

The Court will GRANT the motions to strike the D'Aria memorandum, for two reasons. First, D'Aria, as a member of the class, is represented by plaintiffs' counsel; when the Court sought the parties' comments on the propriety of permitting Kaufmann to withdraw his objections, the Court did not invite the filing of individual briefs by members of the class. Second, D'Aria did not submit a timely objection to the proposed settlement[2] and, by the instant memorandum, is expressly endeavoring to adopt Kaufmann's objections as his own; the Court has already denied D'Aria's request for such relief. (*See* Order Denying Anthony D'Aria's Motion to Join or be Substituted for Lawrence R. Kaufmann, filed Nov. 16, 2006, at 2.)

Turning to the issue of whether Kaufmann's withdrawal of his objections to the proposed settlement should be approved, the Court first finds, contrary to the arguments of both plaintiffs and defendants, Kaufmann's objections were timely. Although Kaufmann

1. Plaintiffs have not filed a reply.

2. Indeed, rather than file an objection, D'Aria submitted a consent form authorizing plaintiffs' counsel to act on his behalf, as well as a claim form, by which D'Aria sought to participate in the proposed settlement. (*See* Wilcox Reply Decl. Exs. A and B.)

did not separately file his objections in the format set forth in the Class Notice, he substantially complied with the Class Notice by submitting those objections in his motion to intervene, which was filed prior to the deadline for objecting to the settlement. As Rule 23(e)(4)(B) does not limit its applicability to objections made only in a particular format, the Court finds said Rule is applicable to Kaufmann's request to withdraw.

As noted, pursuant to Rule 23(e)(4)(B), a class member's objection to a proposed settlement "may be withdrawn only with the court's approval." *See* Fed. R. Civ. P. 23(e)(4)(B). The Rule itself does not set forth the circumstances under which such approval may be given, nor is there any controlling authority on the issue. The Advisory Committee Notes, however, provide the following guidance:

> Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.
>
> Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to

> a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

See Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments.

Here, Kaufmann's objections were made on grounds that apply generally to the class. Although those objections were withdrawn on terms that did not directly affect the terms of the class settlement or Kaufmann's participation therein, Kaufmann did obtain a personal benefit, forgiveness of a loan, in exchange for withdrawing. (*See* Kaufmann Decl., filed Nov. 15, 2006, ¶¶ 2-4.)[3] Nevertheless, Kaufmann is not the sole objector,

3. There is no admissible evidence to support D'Aria's contention that UBS first approached Kaufmann to induce him (Cont'd)

and the Court has before it, as submitted by other class members and, as amicus, by the Attorney General of the State of New York, largely the same arguments against the proposed settlement that were asserted by Kaufmann. Under such circumstances, the Court finds it appropriate to allow Kaufmann to withdraw his objections.

Accordingly, for the reasons set forth above,

1. Plaintiffs' and defendants' motions to strike the D'Aria memorandum are hereby GRANTED.

2. Kaufmann's withdrawal of his objections to the proposed settlement is hereby APPROVED.

This order terminates Docket Nos. 106 and 121.

IT IS SO ORDERED.

Dated: January 17, 2007

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

(Cont'd)
to withdraw. Rather, the evidence is to the contrary. (*See id.*; *see also* Notice of Lawrence R. Kaufmann's Withdrawn Objection to Proposed Settlement Ex. C (Browne Decl.), filed Nov. 14, 2006, ¶¶ 2-6.) The Court sustains defendants' objection to the hearsay declaration of Kenneth Lehn, filed December 15, 2006, in support of D'Aria's motion to intervene.

APPENDIX B — DECLARATION OF ANTHONY J. D'ARIA IN SUPPORT OF MOTION TO INTERVENE AND FOR OTHER RELIEF OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 10, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-06-04068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

DECLARATION OF ANTHONY J. D'ARIA IN SUPPORT OF MOTION TO INTERVENE AND FOR OTHER RELIEF

Date: January 19, 2007
Time: 9:00 a.m.
Ctrm: 7
Judge: Hon. Maxine M. Chesney

Appendix B

I, ANTHONY J. D'ARIA, declare as follows:

1. I am a member in Strategic Wealth Management, LLC, located in Briarcliff Manor, New York.

2. I was formerly employed as a Financial Advisor (broker) by UBS Financial Services, Inc., in New York, New York, from April 21, 2001, to June 30, 2006.

3. Beginning in early to mid-September, 2006, and continuing in October, 2006, I discussed with John Halebian on several occasions this action and the related action concerning UBS brokers in California. Mr. Halebian consulted me about issues involved in the actions and their proposed settlements, and I provided him with various assistance and information. During that time I became aware that Mr. Halebian was challenging the adequacy of the settlements on behalf of another former UBS broker.

On November 15, 2006, after learning that the other broker had suddenly exited the litigation, I authorized Mr. Halebian to challenge the adequacy of the settlements on my behalf and to put me forward in place of the other broker. I have regularly discussed with Mr. Halebian his efforts on my behalf in these actions, including discussions about the Court's decisions, the making of an appeal from some of those decisions, and the withdrawal of that appeal.

Appendix B

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was executed at Briarcliff Manor, New York, on January 9, 2007.

_____/s/_____
ANTHONY J. D'ARIA

Signature attestation: I hereby attest that I have on file the holograph signature for the conformed signature indicated above by /s/ in this e-filed document.

_____/s/_____
JOHN HALEBIAN

APPENDIX C — ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF MOTION TO INTERVENE AND OBJECTION TO SETTLEMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED NOVEMBER 16, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER RE: LAWRENCE R. KAUFMANN'S WITHDRAWAL OF MOTION TO INTERVENE AND OBJECTION TO SETTLEMENT

On November 15, 2006, the Court received a letter from an attorney on behalf of Lawrence R. Kaufmann ("Kaufmann"), dated November 13, 2006, along with Kaufmann's declaration, by which documents Kaufmann notified the Court that Kaufman was withdrawing his motion to intervene in the instant action.

Kaufmann may, without court approval, withdraw his motion to intervene, and the Court considers said motion to be withdrawn. A class member's objections to a proposed class action settlement "may be withdrawn only with the court's approval," however. *See* Fed. R. Civ. P. 23(e)(4)(B). Kaufmann's motion to intervene contains various objections to the proposed settlement in the instant action. Accordingly, the Court must determine whether to approve Kaufmann's request to withdraw said objections, or to deny Kaufmann's request and consider said objections at the January 19, 2007 fairness hearing.

Because plaintiffs and defendants have not had an opportunity to address the issue, the Court will afford the parties an opportunity to brief the matter. Accordingly, no later than December 1, 2006, the parties may file memoranda addressing the issue of whether the Court should approve Kaufmann's motion to withdraw his objections to the proposed settlement. The matter will be taken under submission at that time, unless the Court, after reviewing the parties' submissions, determines oral argument would assist the Court.

IT IS SO ORDERED.

Dated: November 16, 2006

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX D — ANTHONY D'ARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, & FOR OTHER RELIEF OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED NOVEMBER 16, 2006

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

Appendix D

Date: November 17, 2006
Time: 9:00am
Ctrm: 7

Case No. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

ANTHONY D'ARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, & FOR OTHER RELIEF

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on November 17, 2006, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of The Honorable

Appendix D

Maxine M. Chesney, United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, Anthony D'Aria will and hereby does respectfully move this Court:

(1) To add Mr. D'Aria, or substitute Mr. D'Aria for Lawrence R. Kaufmann, as an objector pursuant to the Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing ("the Kaufmann Objections," *Bowman* Docket No. 81);

(2) To add Mr. D'Aria, or substitute Mr. D'Aria for Mr. Kaufmann, as movant and putative intervenor-plaintiff in Kaufmann's Motion to Intervene, for Consolidation and for Other Relief ("the Motion to Intervene," *Bowman* Docket No. 83, *Glass* Docket No. 37); and

(3) For an order, pursuant to L.R. 6-1(b), shortening time for the Court to hear and decide this motion in the hearing scheduled for November 17, 2006.

Memorandum of Points and Authorities

On November 14, 2006, Defendant UBS filed an extraordinary "notice" ("the Notice", *Bowman* Docket No. 133, *Glass* Docket No. 82) that purports to terminate all present and future activity in this litigation by a party

adverse to defendant-objector and putative intervenor-plaintiff Lawrence R. Kaufmann. In particular, the Notice purports to withdraw both the Kaufmann Objections and the Motion to Intervene.

1. The purported "Notice" is defective on its face, and this Court should (a) treat it instead as a motion by Kaufmann for leave to withdraw from his previous role in the litigation, and (b) fully explore the underlying events

As an initial matter, although the Notice purports to announce the withdrawal of the Kaufmann Objections, Rule 23(e)(4)(B) of the Federal Rules of Civil Procedure clearly provides to the contrary that "[a]n objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval." Both on this ground, and because of the highly suspect and irregular events leading to the Notice (discussed below), this Court should treat the Notice as merely a motion for leave to undertake the actions of which it purports to give notice, and should thereupon proceed to explore the underlying facts in a full evidentiary hearing. In furtherance of this factual exploration, Mr. D'Aria should be permitted to depose the participants in the events leading to the Notice and to obtain discovery of all relevant communications among them.

2. The underlying, secret deal between Kaufmann and defendant is highly suspect ethically and legally, and is manifestly intended to derail this Court's consideration of the substantive issues Kaufmann previously raised for the benefit of class members

This highly irregular Notice strongly suggests underlying acts of collusion, fraud, commercial bribery and/or breach of fiduciary duty by Kirby Wilcox, defendant's outside counsel; Vincent P. Browne, defendant's in-house counsel; George L. Mahr, III, Mr. Kaufmann's New Jersey counsel; and Mr. Kaufmann himself. The purported basis for the Notice is a side-deal secretly reached on November 7, 2006, between defendant and Mr. Kaufmann, according to which Mr. Kaufmann agreed to terminate comprehensively all his activities in the interests of other class members in the instant litigation in exchange for release of a private debt owed to UBS. (*See* Exs. A, B and C to the Notice.) The letter and declarations offered in support of the Notice are carefully crafted to provide the least, possible information about this deal—omitting, for example, any information about when negotiations began, by whom they were initiated, or about the conditions under which they were conducted. (*Id.*)

Although on the present record the precise shape of the underlying impropriety remains murky, it is difficult, if not impossible, to imagine a scenario under which such a deal could be consummated without ethical and legal misconduct. It is clear that Mr. Kaufmann has

breached the fiduciary duty to other class members that he took on as putative intervenor-plaintiff and proposed class representative, by negotiating a private deal to abandon, in detail, all his present and future activities for benefit of the class in the instant litigation (preserving only his personal right to "opt in" to the settlement).[1] Mr. Kaufmann has done so for personal financial gain entirely unrelated to any claims in this litigation; in effect, defendant bribed Mr. Kaufmann to collude with defendant in this litigation.[2] In a fraud on

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1. A class representative is a fiduciary. "He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. . . . He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the State to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549-50 (1949). *See Armour v. Network Assocs.*, 171 F. Supp. 2d 1044, 1048 (N.D. Cal. 2001) (Jenkins, J.). *See also Wang v. Chinese Daily News, Inc.*, 2006 WL 1635423, at *1 (C.D. Cal. May 9, 2006) (granting the plaintiffs' motion to strike the defendants' rule 68 offer of judgment as creating "an unresolvable conflict between class representative's fiduciary duty to the class and their own personal interest").

2. Both Mr. Kaufmann and his secret New Jersey counsel, George L. Mahr, III, reside in New Jersey. Section 2C:21-10 of the New Jersey Criminal Code provides, "A person commits a crime if he solicits, accepts or agrees to accept any benefit as

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his own counsel, Mr. Kaufmann undertook his negotiations with defendant through separate counsel without ever informing his counsel in the instant litigation, who continued to actively prosecute the Kaufmann Objections and the Motion to Intervene throughout the secret negotiations, and indeed well after the deal was reached. Mr. Kaufmann maintained this silence, and defendant failed to inform this Court of the resulting deal, until one week after the deal was reached, *i.e.*, just a few days before the hearing on the *Bowman* settlement scheduled for November 17, 2006—a subterfuge aimed at preventing argument to the Court of Mr. Kaufmann's earlier objections and motions relating to settlement. Mr. Kaufmann thus not only ceased to defend the interests of other class members, but actively and affirmatively colluded with defendant to undermine those interests.

In every respect, both the deal's terms and its prolonged concealment were manifestly calculated by defendant (and apparently dictated to Mr. Kaufmann) to maximize the adverse impact on the prosecution of objections to the proposed settlements in the instant actions.

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consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as . . . (2) A trustee, guardian, or other fiduciary." As Messrs. Wilcox, Browne and Mahr all admittedly coordinated or facilitated the payment of the "benefit as consideration" to Mr. Kaufmann to breach his fiduciary duty to class members, all are potentially liable under Section 2C:21-10.

3. To protect the interests of class members on issues originally raised but now abandoned by Kaufmann, former UBS broker Anthony D'Aria should immediately be permitted to join or replace Kaufmann as objector, movant and intervenor-plaintiff

Defendant should not be permitted to quash the Kaufmann Objections and the Motion to Intervene by the simple expedient of buying off the individual class member who made them, thereby benefiting from the illicit and potentially criminal conduct underlying the Notice. As evident from the extensive briefings to this Court in anticipation of the hearing on the *Bowman* settlement scheduled for November 17, 2006, the Kaufmann Objections and the Motion to Intervene raise serious questions about the adequacy of both the *Bowman* and *Glass* settlements. The Notice is a transparent effort to silence those questions without ever reaching their merits. The adequacy of the *Bowman* and *Glass* settlements, however, is a matter that affects all 12,800 potential class members in the actions.

At the same time, Mr. Kaufmann is manifestly no longer able to hold himself out as an objector, intervenor-plaintiff, and putative class representative interested in protecting the interests of other class members, having colluded with defendant to breach his fiduciary duty to class members for private gain, and incidentally committed fraud on his own counsel in this litigation.

Anthony D'Aria therefore seeks leave of this Court to join and, at an appropriate time, to replace Mr. Kaufmann as objector and as movant for intervention, consolidation and other relief in this litigation. As a former UBS broker in New York from April 21, 2001 to June 30, 2006, Mr. D'Aria is fully qualified to object, intervene, and otherwise act as putative class representative to protect the interests of class members in the *Bowman* and *Glass* actions. Allowing the substitution of Mr. D'Aria as putative class representative in place of Mr. Kaufmann would "protect class interests" and so should be permitted. See *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 230 F.R.D. 61, 80 (D. Mass. 2005). As that court noted, such substitution is consistent with the Manual for Complex Litigation. The Manual itself provides:

> Replacement . . . may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation. In such circumstances, courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The court may permit intervention by a new representative or may simply designate that person as a representative in the order granting class certification.

§ 21.26, at 277, Manual for Complex Litigation, Fourth (footnotes omitted). *See also Davis v. Thornburgh*, 903

F.2d 212, 233 (3d Cir. 1990) (Becker, J., dissenting) ("afford[ing] an opportunity to provide a substitute . . . is the common practice").

In the urgent circumstances created by Mr. Kaufmann's and defendant's deliberately disruptive and illicit tactics, Mr. D'Aria respectfully urges the Court to exercise its discretion to waive the timing requirements that would normally apply to his motion, and to hear and decide the motion in his favor in the hearing scheduled for November 17, 2006. This will enable Mr. D'Aria to participate in this litigation immediately in place of Mr. Kaufmann so that the Court's consideration of the proposed *Bowman* and *Glass* settlements may proceed fully and fairly without delay.

Dated: November 16, 2006

Respectfully submitted,

LOVELL STEWART HALEBIAN LLP

By _____/s/_____
JOHN HALEBIAN (*Pro Hac Vice*)

Attorneys for Lawrence R. Kaufmann

APPENDIX E — CONSENT TO JOIN FORM FILED SEPTEMBER 25, 2006

CONSENT TO JOIN SETTLEMENT

ANTHONY J. D'ARIA
57 MOUNTAIN RD
PLEASANTVILLE NY 10570-1911

Mail to:

Kevin McInerney, Esq.
McInerney & Jones
18124 Wedge Parkway, Suite 503
Reno, NV 89511

Anthony D'Aria consents to be a party plaintiff in the above action pursuant to Section 16(b) of the Fair Labor Standards Act, and authorizes Class Counsel to act on his/her behalf in all matters relating to this action, including the settment of his/her claims.

Anthony D'Aria
Print or Type Name

s/ Anthony D'Aria
Signature

Date: 9-22-06

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